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## The Politics of (Evidence) Rulemaking

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*Symposium  
Association of American Law Schools,  
Annual Meeting,  
Evidence Section Program*

**The Politics of [Evidence]  
Rulemaking\***

Recent changes to federal evidence law, such as new rules on the admissibility of a defendant's prior sexual conduct and amendments to the rules regarding expert testimony, have highlighted the political aspects of procedural rulemaking. This panel grappled with questions such as the following: who should make the evidence rules—the judiciary, the legislature, the executive? What role should the practicing bar, law professors and the general public play in the creation of the rules of evidence? What is the proper function of the Federal Rules of Evidence Advisory Committee—to codify case law, to develop rules and amendments to respond to criticism of existing case law, or to develop solutions to evidentiary problems unforeseen by the original drafters? Are there special considerations that apply to evidence law that do not apply at least to the same degree, to other civil or criminal rules of procedure?

The panelists brought rich experience and qualifications to the questions discussed. Judge Fern Smith is a Federal District Court Judge for the Northern District of California. She served as a member of the Federal Rules of Evidence Advisory Committee from its re-inception in 1993, serving as Chair from 1996 to 1999, when she assumed her current duties as the Director of the Federal Judicial Center. Professor Kenneth Broun and Mr. Gregory P. Joseph also served as members of the Advisory committee from 1993 to 1999. Professor Broun now serves the Advisory Committee as Consultant to the Subcommittee on Privileges. In addition to his service on the Advisory Committee, Mr. Joseph has served as the Chair of the

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\* Presented January 5, 2002 in New Orleans, Louisiana.

Litigation Section of the American Bar Association and as the ABA advisor to the Uniform Rules of Evidence Committee of the National Conference of Commissioners on Uniform State Laws. Professor Laird Kirkpatrick recently served as the Department of Justice representative to the Advisory Committee and has had experience in the development of state evidence rules. Professor Paul Rice, who is the Director of the Evidence Project at American University, has been a persistent critic of the Federal Rules Advisory Committee and the current federal rulemaking process.

Professor Eileen A. Scallen, Professor of Law at William Mitchell College of Law, served as moderator of the panel. The panel was conducted as an interactive discussion among panelists and audience members. Thus, the comments in the transcript here retain their less formal and extemporaneous quality.

**Eileen Scallen:** Let me introduce myself. I am Eileen Scallen from William Mitchell College of Law and this is the Evidence Section program on the Politics of [Evidence] Rulemaking. The phrase "evidence" is in brackets because one issue for discussion is this: Are we just talking about rulemaking in general or are evidence rules somehow special? We debated broadening this panel to include people from the Bankruptcy, Civil Procedure, rules, etc., but ultimately ended up thinking we could do a better job keeping it focused on the rules of evidence. So, we welcome your input on this issue of whether evidence rules are somehow "special."

Let me talk to you about the format of today's program. The panelists and I all talked via e-mail and concluded that we are a little bit tired of the "talking head" kind of presentations. We thought we would try something a little bit more interactive and different. So, we are going to adopt the talk show "Oprah" model. We're going to hope that it doesn't turn into "Jerry Springer," but you never know. But we'll try to keep everybody in good health and good spirits.

I'll spend about an hour posing questions to the panelists, maybe asking some follow-up questions. And the panelists will be asking each other questions and responding to each other's comments as we go along. But we are going to try to limit that part of the program to about an hour so that for the last part of the session, which will go all the way to 12:15, I can come to you with the mike and have you ask questions of our panelists.

Let me go ahead, in the spirit of these things, and introduce our distinguished guests for today. We are very lucky to have a wonderful group. First of all on my left is Judge Fern Smith who is a U.S. District Court Judge for the Northern District of California in San Francisco but currently, since 1999, she is serving as the Director of

the Federal Judicial Center.<sup>1</sup> We are very happy to have her here. As the program indicates, she not only served as a member of the Federal Rules Advisory Committee, but also served as chair for a number of years and presented the most recent packages of rules that were ultimately approved, including the expert testimony rule codification. So, she has very interesting things to say.

Professor Paul Rice from American University has been a persistent critic of the Federal Rules of Evidence Advisory Committee. He is the Director of the Evidence Project, that I am sure he will tell you something about, at American. He has written not just on these issues of rulemaking but extensively about evidence law and specifically attorney-client privilege. Most recently, he has been "blowing the whistle" in his book on *The Best Kept Evidence Secrets*.<sup>2</sup>

After Professor Rice is Professor Laird Kirkpatrick, who is currently a professor at the University of Oregon but who is going to be a visiting professor during spring semester, 2002, at one of my old haunts, the University of California, Hastings. Professor Kirkpatrick, of course, has written extensively on evidence law with and without his evidence casebook co-author Chris Mueller.<sup>3</sup> Professor Kirkpatrick is also on this panel because he served in a special capacity as the Department of Justice representative on the Federal Rules Advisory Committee. So, he has had the interesting experience of being both a law professor and being the Department of Justice representative. He'll talk about that.

To bring us down to earth, next in line on our panel is Greg Joseph, who, despite his youthful appearance, is an amazing individual.<sup>4</sup> He is a certified trial lawyer and has litigated cases from

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1. The views expressed by Judge Smith here are her own and do not necessarily reflect those of the Federal Judicial Center, the United States Supreme Court or other members of the federal judiciary.

2. Professor Rice is a professor of law and Director of the Evidence Project at the American University Washington College of Law. Recently, he has authored *BEST KEPT SECRETS OF EVIDENCE LAW: 101 PRINCIPLES, PRACTICES & PITFALLS* (Anderson 2001); *EVIDENCE: COMMON LAW AND THE FEDERAL RULES OF EVIDENCE* (LEXIS 4th ed. 2000); *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* (West Group 2d ed. 1999); and *ATTORNEY-CLIENT PRIVILEGE: STATE LAW* (Rice Publishing 2001), available at <http://www.acprivilege.com>.

3. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES* (4th ed. 2000); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* (2d ed. 1999).

4. Mr. Joseph is a member of the American College of Trial Lawyers and former Chair of the 60,000-member Section of Litigation of the American Bar Association. By appointment of Chief Justice William Rehnquist, he served on the Advisory Committee on the Federal Rules of Evidence from 1993-99. He also served as Chair of the New York State Courts' Committee of Lawyers to Enhance the Jury Process, by appointment of New York Chief Judge Judith Kaye. He formerly chaired the Litigation Department at Fried,

your basic tort cases to your most complex securities actions. But unlike most practitioners, he somehow finds the time to be active in the Federal Rules Advisory Committee, having served as a member, and has also served as a liaison to the Uniform Rules of Evidence group and all sorts of other law reform groups. He has written extensively on visual evidence—modern visual evidence—and other evidence topics. So, where he finds his time I don't know. One of my favorite Minnesota lawyers refers to you, Greg, as a "heavy hitter." From a state that elected Jesse "the Body" Ventura, the wrestler, as our governor, that's high praise. So, you are our "heavy hitter."

Our "clean-up" batter in the panelist line-up is Professor Ken Broun from the University of North Carolina, who, in addition to having serving on the Evidence Rules Advisory Committee in the past, is now a consultant to the Committee on a project of codifying the law of privilege.<sup>5</sup> That's a fascinating project because, as those of you who are familiar with the history of the Federal Rules of Evidence know, privilege was one of the sore spots when the rules were originally codified.<sup>6</sup> So we'll talk to him about his project.

With that, I'm going to launch into my first question, which is directed at Judge Smith. You were a member, then you were the Chair, of the Federal Rules of Evidence Advisory Committee. How does the Committee pick which rules to create and which rules to amend—how does it work?

**Judge Fern Smith:** Well, it's sort an amorphous system where information drifts into the Committee from a variety of places. First of all, the Committee is very diverse in terms of its members. It is made up of a combination of federal judges, a state court (usually) justice, somebody from the Department of Justice, a public defender, lawyers, and academics. The Reporter on the Committee is incredibly influential. I think, while one might assume from Professor Rice's article that the Chair really directs and controls everything, I would suggest that the Reporter is the most important person on the Committee. Because the reporters are always academics, it is their job to keep track of what is going on out there in law review articles,

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Frank, Harris, Shriver & Jacobson in New York. He is currently Co-Chair of the Third Circuit Task Force on Selection of Class Counsel by appointment of Chief Judge Edward Becker. Mr. Joseph is also a widely published author of several books and articles, including *CIVIL RICO: A DEFINITIVE GUIDE* (2d ed. 2000); *MODERN VISUAL EVIDENCE* (1984 & Supp. 2001); *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (3d ed. 2000); and *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* (1987 & Supp. 1994) (four volumes) (co-author with Stephen A. Saltzburg). A full bibliography of his work is available at his law firm website <http://josephnyc.lawoffice.com>.

5. KENNETH S. BROUN ET AL., *CASES AND MATERIALS ON EVIDENCE* (5th ed. 2000); KENNETH S. BROUN, *PROBLEMS IN EVIDENCE* (4th ed. 2000).

6. Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769 (2002).

in cases, etc., and to bring problem areas to our attention. People like Greg who are in the courts come and say, "you know there is a real problem that I see in the courts."

So, things come in and we say, "is there a real problem here?" If there is, then we talk about what we might be able to do to ameliorate it. Now, when I first was on the Committee as a member, we went through the entire Rules of Evidence, every section, talking about whether the section was working well, or was it not working well. We picked out various sections that we felt weren't working well and went from there.

Let me give you an example: As the *Daubert* trilogy<sup>7</sup> came out, there was of course a lot of talk about whether the rules on expert evidence ought to be changed. The decision was made to basically see what the case law did with those cases first. Was it going to be a problem? Was it not? Should we meddle? Or shouldn't we? We waited for several years and then it became obvious that there was a problem. There were a lot of conflicts among the circuits. So we thought we had a contribution to make by trying to amend those rules to be a little more certain—to give more guidance—to both lawyers and trial judges. That's what we did.

Now, I think it is important to understand, if I can take a couple of minutes, how the process works. The Advisory Committee is just the starting point.

**Scallen:** Yes, would you explain that to us because I explain this every year to my students, and they glaze over. Hopefully, this group is more interested.

**Judge Smith:** I can understand. I glazed over until I got on the Evidence Committee. The rulemaking process is not something that many trial judges give a whole lot of attention to, frankly.

Basically, the rulemaking provisions are set forth in Title 28, 2071-2077.<sup>8</sup>

**Scallen:** Let me interrupt you for one second. There are papers back there. It's a paper that's written by Paul Rice but in the footnotes you will find a lot of these relevant portions of the Rules Enabling Act that Judge Smith is talking about.

**Judge Smith:** Thank you. And these are generally all part of the Rules Enabling Act.<sup>9</sup> In that Act, Congress basically said that the Supreme Court and all of the courts established by acts of Congress

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7. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

8. Rules of Procedure & Evidence, 28 U.S.C. §§ 2071-77 (2001).

9. Rules Enabling Act, 28 U.S.C. § 2072 (2001)(Originally enacted as Act of June 29, 1934, ch. 651, 48 Stat. 1064, codified as revised at 28 U.S.C. § 2072-2074).

could make their own rules to a certain extent. That's section 2071. And, I'm going to summarize these statutes very briefly.

Then it went on to say in section 2072 that the Supreme Court shall have the power to prescribe general rules of practice and procedure and the rules of evidence for the United States courts.

Section 2073 talks about the method of doing that. It basically says that the Judicial Conference shall prescribe and publish the procedures that are used in that rulemaking process. It goes on to say that while the Judicial Conference "shall," using mandatory language, authorize appointment of a Standing Committee on Practice and Procedure, the Judicial Conference "may," that is, in its discretion, appoint other committees to help out.

So, that's where the Advisory Committee on the Rules of Evidence comes in. We're the "may" group. Basically we can be wiped out anytime the Judicial Conference thinks that we're not appropriate or not helping.

It's important to understand that the Evidence Committee, or any of the Advisory Committees, are simply a beginning point. When we make a recommendation it goes first to the Judicial Conference's Standing Committee on Rules of Practice and Procedure. If they approve it for public hearing, then there are public hearings at which the public, anyone really, is invited to comment. Then, if the Standing Committee at a later time approves our proposed change, it goes to the Judicial Conference. If they approve it, the proposal goes to the Supreme Court and if the Court approves it then it goes to Congress.

**Scallen:** Can I interrupt you for just one point on that. For people interested in teaching any kinds of these issues, or doing scholarship on these issues, both the Federal Judicial Center's website<sup>10</sup> and the U.S. Court's website<sup>11</sup> have a very clear and very accessible description of the rulemaking process that Judge Smith is summarizing. The web sites contain an amazing wealth of information that used to be very hard to access, such as all the minutes of the Advisory Committee meetings, as well as notes and archives of all sorts of past documents that have been created or used, not just by the Evidence Rules Committee but also by the Civil Rules Committee, the Bankruptcy Rules, the Appellate Rules, and Criminal Procedure Rules. So, for those of you who find this stuff interesting, as we do, I highly recommend those web sites. They are terrific.

**Judge Smith:** Thank you for the plug. We appreciate it. I just want to make one other comment. I think it is important to put in the

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10. The Federal Judicial Center's website is <http://www.fjc.gov>.

11. The United States Judiciary's website is <http://www.uscourts.gov>.

context of how we're viewing this and in thinking about Professor Rice's article.<sup>12</sup>

The rulemaking process, like the judiciary itself, is inherently conservative. When I say that I don't mean Republican/Democrat conservative. I mean that we are resistant to change. The judiciary doesn't jump in and change the law every time somebody looks around. That's why cases aren't overturned easily. And that's also why rules aren't amended easily. If you start from the bottom, which is where I consider the Advisory Committee to be, then you go to the Standing Committee, but the Standing Committee is more conservative about change than the Advisory Committee. Then a proposal goes to the Judicial Conference, which is more conservative about change than the Standing Committee. Then finally it goes to the Supreme Court, which is probably the most conservative of all, regardless of who may be the Chief Justice at a given time. However, it is very rare that the Supreme Court will object to a rule amendment that has been approved by the Judicial Conference.

It is a time consuming, very slow process. By the time you work through the amendment you want to propose, it goes to the Standing Committee, they decide if it is even worth public hearing, you go to public hearings, you come back to the Standing Committee—it's a matter of a couple of years—two to three years at a minimum from start to finish. So, that's how it works.

**Scallen:** I want to follow up with a kind of an awkward question, but it fits into the theme of this conference which is "Recommitting to Teaching and Scholarship." One of the questions I always have as a legal scholar is, does evidence scholarship matter? Does legal scholarship help your Committee at all?

**Judge Smith:** I think it depends on the scholarship. If you were to say to me, does an article that has some empirical evidence suggesting that a particular rule of evidence isn't working, that there are an increasing number of reversals based on a particular rule of evidence, that there is a serious conflict among the circuits about the way a rule of evidence is viewed, is that helpful? Sure. Those are the kinds of things that the reporters bring to our attention very quickly and that we take very seriously.

If there is an article by a professor saying, "woulda, coulda, shoulda"—"if I had written them I would have done it differently"—does that have a lot of influence? Probably not. Not unless the article is followed up by some bar groups and judges saying, "hey, you

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12. Paul R. Rice, "The Politics of Rule-Making" *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817 (2002).



know she has a good idea, it should have been done differently." Would we then think about it? Yes.

**Scallen:** Speaking of "woulda, coulda, shoulda," one of the most frequent writers in that vein is Paul Rice. I'm going to turn to you at this point, Paul, now that we've had an introduction. We've heard that while things start with the Advisory Committee, it truly is just the beginning. The Advisory Committee has to answer not only to the Standing Committee of the Judicial Conference, but also to the Judicial Conference as a whole and then, ultimately, to the Supreme Court. So, your scholarship has been very critical of the Advisory Committee's unwillingness to propose changes to the evidence rules. How do you want to respond to the argument that, given this rulemaking process, change will be conservative and slow?

**Paul Rice:** First of all, if change doesn't start it doesn't go. If the Advisory Committee doesn't draft it, a change doesn't go to anybody. Because the rulemaking power has been delegated to such a degree, the Advisory Committee is on the bottom of the totem pole, but it has to start there to go anywhere. My problem is that they don't start enough changes there so that many problems have been left unaddressed even from the time the code was initially enacted. There are articles of the Federal Rules of Evidence that have never been touched by the Advisory Committee. I don't blame the more current Advisory Committee as much as those to whom the Federal Rules of Evidence were assigned initially—the Criminal and Civil Procedure Committees. It was sort of the unwanted step-sister that got very little attention in those committees. Since that time, however, there still has been no action on a number of articles. The Advisory Committee has to take a broader view of what their responsibility is.

The reason that I say this is because the scholarship that is not being given serious attention by the Advisory Committee is my scholarship—the Evidence Project Report. It consisted of 350 pages, written by about 45 people who worked on it for two years. When the Report was virtually summarily dismissed *in toto*—and we were warned that this was going to happen by members of the Advisory Committee before we even wrote it—the decision was, "well, maybe we should go to the body that the Advisory Committee is silently telling us we should go to. If we want major things to happen, we should go to Congress."

Well, Congress doesn't do this kind of work any more. Congress took the common law power of the judges away to create new rules when they codified the Federal Rules of Evidence. The members of Congress had this entire code produced, but they didn't want to maintain it. However, under the Rules Enabling Act, beginning in the 1930s with the Rules of Civil Procedure, Congress delegated rulemaking to the Supreme Court and the Judicial Conference of the

United States, which then delegated it to a Standing Committee on Practice and Procedures, which then in turn delegated it to an Advisory Committee on the Rules of Evidence. Well, the Advisory Committee doesn't have anybody to delegate it to. So, change is going to have to start there.

Actually, in many instances, change doesn't start there because of the Committee's very limited view of their responsibility to maintain the rules. The Committee construes its role very narrowly. The Chief Justice, who appoints all the members of the Advisory Committee, apparently does not want anything that looks like law reform and appoints people who will agree with this limited role. So, the Advisory Committee is composed of people who have agreed, by accepting the position I assume, that they will follow the very limited interpretation of what their responsibilities are.

**Scallen:** Can I ask you a follow-up question at this point? When you say Congress is out of the act of rulemaking, how can you say that in light of Rules 413, 414 and 415,<sup>13</sup> which Congress promulgated and passed into law, despite virtually unanimous opposition by evidence scholars and the Judicial Conference?<sup>14</sup>

**Rice:** Yes, the Advisory Committee opposed Molinari's revisions—yeah.<sup>15</sup>

**Scallen:** Well how can you say that Congress is out of the picture? Congress seems very interested in these evidence issues.

**Rice:** Members of Congress are interested in the issues that are politically sensitive, that has a constituency that they think they can get some votes from. That's the only reason Molinari proposed Rules 413-415. When former President Reagan was shot and the defendant was tried, the Washington Post and other national papers as well as members of Congress talked about what a circus the trial was. They had to act to counter the public circus that went on in the courtroom. I don't believe it was a circus, but they thought it was, so we got Rule 704(b).<sup>16</sup>

It is only in instances like that that we are able to get them involved. The congressmen and senators that our Evidence Project

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13. FED. R. EVID. 413 (Evidence of Similar Crimes in Sexual Assault Cases); FED. R. EVID. 414 (Evidence of Similar Crimes in Child Molestation Cases); FED. R. EVID. 415 (Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation).

14. This exchange is in regard to Federal Rules of Evidence 413, 414, and 415, which were passed by Congress as direct legislation, as opposed to the Rules Enabling Process. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (Sept. 13, 1994).

15. The sponsor and chief advocate for these rules was House of Representatives member Susan Molinari. See 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994).

16. FED. R. EVID. 704 (Opinion on Ultimate Issue). FED. R. EVID. 704(b) was added by Pub. L. 98-473, Title II, § 406, 98 Stat. 2067 (1984).

Report went to, were from very good backgrounds, lawyers with very good educations, but they said, "you know, we didn't understand evidence really well in law school, and we don't understand it now. We really won't get involved in revising rules that we don't fully understand and would not know the implications of." I appreciated their candor, but I was disappointed that we couldn't get them to actually help us. They said quite frankly, "there is no constituency that this appeals to. For us to go in and look at expert witness rules, or look at presumptions, well, we don't have anybody that cares about that. That doesn't get one vote for us."

**Gregory Joseph:** Oh? Congress has not had a series of bills on expert witness rules, emanating from *Daubert*<sup>17</sup> which were so confused that they tried to both codify *Daubert* and codify *Frye*<sup>18</sup> simultaneously?

Are you suggesting that they did not essentially force the Advisory Committee into taking action on the question of the admissibility of evidence of the character of a victim, when it is introduced by a criminal defendant, so that there would be some reciprocity? That Congress did not force the Advisory Committee to act to prevent a Congressional atrocity—because those young people doing Congress' drafting don't have any idea what they are doing?

**Rice:** No, I'm suggesting on a very limited basis that Congress does get involved when they either think they will get votes, or there is an interest group that is strong enough and supports it . . .

**Joseph:** But they won't get involved when, for example, from your article, the question is whether the ancient document rule ought to be in Rule 803 or 801?<sup>19</sup>

They won't get involved when the question is whether or not Rule 703<sup>20</sup> somehow prevents doctors or other experts from giving testimony, or permits testimony they couldn't otherwise give, because, for example, the x-ray hasn't been admitted? They don't get interested in questions like whether, because Rule 704<sup>21</sup> only precludes experts from giving opinions regarding a person's mental state, that somehow lay people are permitted to do? They aren't interested in those questions?

**Rice:** No, I'm saying Congress generally will not get involved in an overview of the code. They don't want to stay involved in it. They will, on a limited basis, make recommendations—as was done with the Molinari amendments, which are now Federal Rules of Evidence

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17. *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579 (1993).

18. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

19. FED. R. EVID. 803 (Hearsay Exceptions; Availability of Declarant Immaterial); FED. R. EVID. 801 (Definitions).

20. FED. R. EVID. 703 (Bases of Opinion Testimony by Experts).

21. Fed. R. Evid. 704 (Opinion on Ultimate Issue).

413-15, the rules admitting character evidence of sex offenders. The Advisory Committee initially rejected those proposed rules, so Representative Molinari tacked them on as amendments to another piece of legislation.

**Scallen:** Okay, Ken Broun wants to get into the fray.

**Ken Broun:** I was going to make the same point that Greg did in terms of Congress' heavy involvement in the expert witness rules. But, isn't it just as likely that Congress is not getting involved because the changes you say are needed are because those evidence rules don't teach as well as they otherwise would, that our students have trouble understanding them? But in fact, the courts are applying these rules consistently and reasonably. Perhaps Congress isn't getting involved and the Rules Committee isn't getting involved because the rules are essentially working—whether or not they are as artistically drawn as we might like.

**Rice:** No, I wouldn't agree with that. On the issue of expert witnesses, I think it is one of the articles that needs the most attention. There are issues in those rules that the Advisory Committee has never addressed.

One of the issues is the admissibility of the basis of expert witnesses' opinions. The current rule appears to come from doctors being able to rely on medical history and causation when they would give a diagnosis in the courtroom and could recite the medical history and causal factors leading to the doctor's opinion, but the testimony didn't come in for its truth. There was a question about the educational background of such experts—whether they ought to be able to rely on that.

The rule we came up with allows experts to rely on adjudicative facts that are involved in the resolution of a dispute, that under the current rule, the jury never gets to hear. Or, if they get to hear this evidence, under the new revisions of the rule, it is only if the proponent can show that the probative value of the evidence substantially outweighs the potential prejudice. By doing this, by allowing experts to rely on adjudicative facts not before the jury, we are changing the roles of the people in the trial.

In many cases, and I can speak to patent cases, since I consult a bit in those cases, it is very clear that the experts would not reach the conclusions they are reaching—and encouraging the jurors to reach—without that additional inadmissible evidence. So essentially, the proponents of expert testimony under the current rule are asking the jury to accept a conclusion which the experts wouldn't accept if they were on the jury because the jury won't be permitted to hear and evaluate the additional evidence.

**Scallen:** Okay, Paul. I'm sure we will get into the specifics of certain rules, especially in questions from the audience. At this point,

let's think of an alternative rulemaking scenario, where Congress alone makes the evidence rules.

I assume you know that one problem the Advisory Committee on Evidence Rules faced last year was its own possible extinction. It is pretty well known among some circles that the Advisory Committee was almost disbanded under the direction of the Judicial Conference. That motion was only narrowly defeated. Do you know why they were almost disbanded? Because they were viewed as too activist. This Advisory Committee was viewed as too activist in the eyes of some members of the Judicial Conference. That's what the Advisory Committee means about operating within a conservative process. How do you respond to that?

**Rice:** No, I don't think the Advisory Committee should be abolished; now that we have codified the system of evidence rules, there has to be some mechanism for getting the ball rolling for changes. My only comment throughout this has been that the ball ought to be rolling sooner on some of the issues. There have been concepts tried under the initial Federal Rules of Evidence that were marvelously successful. Article X<sup>22</sup> is the best example.

There have been other rules that have not been successful. We have an entire Article of the Federal Rules that has not been touched because Congress changed the concept of presumptions under Article III<sup>23</sup> to make presumptions follow the "bursting bubble" approach. Now we have a situation where we don't know what common law presumptions survive because the initial Advisory Committee and Congress took the matter of presumptions away from the common law judges and codified it. But, they created this elaborate roadmap but build no roads; they haven't cited or created a single presumption. Elsewhere in the code for authentication, they talk about presumptions created by Congress where it is explicitly mentioned . . .

**Scallen:** Paul, help us out here, as Oprah would say. Help us out here . . . because the problem I'm having is this: If the Advisory Committee gets the ball rolling on any number of these issues, including presumptions, the ball is going to roll but it is going to hit a big, flat wall. It's going to stop. So what good is it if the Advisory Committee believes everything you say and then they are told by the Standing Committee and the Judicial Conference and ultimately the Supreme Court: "Forget about it!"

**Rice:** Well, I think the Advisory Committee ought to be serving in the role like a Republican advisor to a Democratic President—

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22. FED. R. EVID. art. X (Content of Record, Writing, Recording, Photograph, Image and Other Record).

23. FED. R. EVID. art. III (Presumptions).

you're not there to be a "yes" person. You're there to try to give the other point of view. You're there to try to start the ball rolling on issues you have found that may create problems. And, if others, in their wisdom, disagree—then a record has been made that the process was started.

The one big problem with the system today is that when the Advisory Committee doesn't take the action they should, every single contested evidentiary issue is brought before a judge for a ruling. She had no choice. She had to rule on it. Over time, then, the rules started evolving. The Advisory Committee doesn't have to rule on anything. As a result, issues can be left unaddressed for decades.

**Scallen:** Okay. I am back to you now, Judge Smith. But I'm going to turn the tables. I'm going to work now with Paul here. Your own reporter, Dan Capra, who I really wanted to be here and who was terrific at helping me get this panel together—even though at times it was against his own interest—Dan has written a report about the divergence of case law from the codified rules.<sup>24</sup> I want to read to you a couple of lines from Dan's report and see how you react to this. It relates exactly to what Paul was saying. Dan says, and this also is available on the Federal Judicial Center's website, downloadable and also it is in the Federal Rules Decisions.

Dan Capra says, "The Advisory Committee on Evidence Rules, which this author currently serves as Reporter, has expressed concern that the divergence between case law and the text of the Rule might create a trap for the unwary." (I'm omitting citations).

Then Dan says:

One way to correct this divergence might be to propose an amendment to the text of any Rule subject to divergent case law. But the Advisory Committee is acutely aware of the costs of amending an evidence rule—amendments can lead to the disruption of settled expectations, and may create further problems of interpretation and divergence.

The Advisory Committee resolved to take a less drastic course—a course that would not require an amendment of any rules and yet would highlight for lawyers and judges the existence of divergent case law. The Committee directed the Reporter to prepare this report in an effort to increase the awareness of counsel practicing in federal courts, as well as judges, about the possibility that case law has diverged from the text of some of the Federal Rules of Evidence. This divergence comes in two forms: (1) where the case law (defined as case law in at least one circuit) is flatly inconsistent with the text of the Rule, the Committee Note explaining the text, or both; and (2) where the case law has provided significant

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24. Daniel J. Capra, *Case Law Divergence from the Federal Rules of Evidence*, available at <http://www.fjc.gov> and reprinted in 197 F.R.D. 531, 533 (2000).

development on a point that is not addressed by either the text of the Rule or the Committee Note.

Professor Capra identified twenty-one different instances in which the case law was flatly inconsistent with the text of the rules. And Professor Capra found eleven potential new situations unaddressed by the rules or Committee Notes.

Now, Paul kind of has a point when he says there is a lot of law out there that the current rules don't handle very well. So, what do we do about that?

**Judge Smith:** Well, one of the reasons you get divergence is that the evidence rules leave enough room for judges to put in a certain amount of subjective interpretation when equity requires.

I have read Professor Rice's article and, unfortunately, I got in very late last night so haven't read it as carefully as I'd like. The impression from that article is that the poor trial judges are caught in this incredible bind, wanting to be common law judges but these rules constrict them and hamper them. Well, as far as I know, that is just not the truth. I shouldn't say the truth; it's simply not accurate.

But I have never felt incredibly hampered by the Federal Rules of Evidence. Are there some I disagree with? Sure. I have never heard my colleagues say, "oh, if only I didn't have to live with the Rules of Evidence my life would be so much better." They just don't feel that way because we do have room to move. Yes, there is divergence and it's because there is room to move. So, you get the 11th Circuit saying yes, you get the 9th Circuit saying no, and the 4th Circuit saying maybe. That's what the common law leads to. I don't think that a thorough rewriting of the Federal Rules of Evidence would change any of that. You'd have exactly the same problem.

I have to say one other thing. The ball doesn't roll more often because the people who use these rules, the judges and the trial lawyers, don't want the ball rolling. In the six years that I was on the Committee, either as member or as the Chair—and Laird and Greg and Ken can all disagree with me or add to this, which they have shown they are very willing to do on numerous occasions—never did anybody except Professor Rice's forty-five people on the Evidence Project ever second his suggestions.

Now, if the rules are in such bad shape why doesn't the Litigation Section of the American Bar Association say something? Why doesn't the Evidence Section say something? Why doesn't the Defense Research Institute say something? Or the Association of Trial Lawyers of America? Nobody has come up and said, "you know, Judge, you really ought to listen and you really ought to read this because these rules are terrible." It just hasn't happened.

**Scallen:** Excellent point. It's a good segue. We are not leaving either Paul Rice or Judge Smith for good. We will be back, I

guarantee. But someone who had a seat at the table is Laird Kirkpatrick. So, Laird, what is the role of the person in that seat? The Department of Justice as well as the Federal Public Defender have official or unofficial seats on the Advisory Committee—what are the roles of those members?

**Laird Kirkpatrick:** Yes, the Department does have a seat. I was privileged to have the opportunity to serve as counsel to the head of the Criminal Division during the last two years of the Clinton administration. As part of my portfolio, I got to be the Department's representative on the U.S. Sentencing Commission and on the Committee that drafts the Rules of Criminal Procedure. And then, of greatest interest to me, I was also the representative to the Evidence Advisory Committee. So, I had a chance to work with Judge Smith, with Greg and with Ken and the others on that Committee. It was a fascinating process, after writing about evidence and teaching it a number of years—as we all have in this room—to participate in the rulemaking process.

I think the Department of Justice was given a seat on the Evidence Advisory Committee, just as it is on the other Rules Committee and the Sentencing Commission, because the Department plays such a major role in federal court litigation. The Department of Justice is a party of course to all criminal prosecutions and the Department is a party to a very significant percentage of civil cases. There are about 8,000 attorneys that work for the U.S. Department of Justice. It's far larger than any law firm in the country. So it really is an 800 pound gorilla as far as federal litigation is concerned. That's why the views of the Department are solicited on things like proposed evidence rules that could affect the work that the Department attorneys are doing.

I was there in a representative capacity, as I indicated, so I didn't have the freedom that Greg or Ken had, as a practitioner or as a law professor, to simply state what I thought about the rules. I was there to represent the views of these 8,000 attorneys. But, interestingly, there was quite a bit of conflict in the Department on a lot of the issues. Some branches of the Department do more plaintiff's work, some do more defense work.

Even though I was with the Criminal Division, I had to consult with all the other divisions in formulating the Department of Justice posture with respect to the proposed amendments and to formulate what recommendations we were making for new amendments. The Environmental and Lands people often would favor, for example, on Rule 701,<sup>25</sup> a more liberal standard on lay witness testimony. They sometimes would have their agents give testimony about pollution or

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25. FED. R. EVID. 701 (Expert Testimony by Lay Witnesses).



whatever they didn't feel was necessarily expert testimony. The Civil Division wanted a very tough, tight standard on expert testimony under 701 and 702.<sup>26</sup> Even within the Criminal Division there was a split on how tight the standards should be in these proposed expert testimony rules, because prosecutors putting up police officers wanted them to be able to say they smelled marijuana without automatically turning that person into an expert witness on the smell of marijuana. But if it was the defendant offering some kind of exotic syndrome evidence, then in those situations the prosecutors would want a fairly tough standard as to what was valid, scientific evidence. Often it was hard for the Department to develop a consistent position given that many of the attorneys are on different sides and have very different perspectives of what a good rule should be.

I felt fortunate that, during the time I was there, the instructions from the Attorney General were to urge whatever would be the best policy—certainly to protect the interests of the Department of Justice, but not necessarily to try to tip the table in favor of prosecutors in every type of situation. I don't think that's always been necessarily true in the past, but, at least fortunately for me, I wasn't instructed just to always to take a position that would give any type of advantage to the prosecutor with regard to the rules amendments.

Is the process political? Certainly. Not only within the Department of Justice in formulating rules but, particularly with respect to the Federal Rules of Evidence, the rulemaking process has always been political. We know, as evidence teachers, that Congress took an interest in the entire set of Federal Rules of Evidence and vetoed what the Supreme Court had proposed under the Rules Enabling Act. The Civil Procedure Rules basically went through without congressional attention. The Criminal Rules went through without congressional attention. But when the Federal Rules of Evidence were promulgated, Congress stepped right in and vetoed them, held up the effective date and wanted to go through the rules one by one.

**Scallen:** Laird, I'm going to ask Greg about that in just a second. I want to ask him why the Evidence Rules draw this fire—why do the drafters of the Evidence Rules seem to not be able to get away with things that the Civil Rules Committee can do willy-nilly. But that's for Greg. Let me follow up with a question for you. It's a political process; there's really conflicting policy interests all around. Judge Smith has an excellent point that if there are these other issues pending why haven't other groups brought them out? But, again, I wonder whether it wouldn't be just easier if these various

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26. FED. R. EVID. 702 (Testimony by Expert).

stakeholders were sitting around the table with you on the Advisory Committee? For example, there is a Department of Justice seat, there's a Public Defender's seat—so why not a seat for the American Trial Lawyers Association? Why not a Defense Research Institute seat for balance? What makes the federal government so special here in terms of the creation of the Federal Rules of Evidence?

**Kirkpatrick:** Well, I think it is the amount of litigation that the federal government does. I certainly wouldn't be opposed to an expanded Committee. But, I think it is a matter of balancing the size of the Committee with what is effective in Committee deliberations.

I think the theory is that public hearings will be held with respect to any work done by the Committee. Certainly when the Committee proposed the codification of *Daubert* and *Kumho* in Rules 701 and 702, those were the most well attended hearings—the plaintiffs' lawyers came, the defendants' lawyers came. There was an enormous amount of input.

**Scallen:** But then we have to go back to Professor Rice's point—those public hearings only happen if the ball gets rolling on a proposed amendment. The only time that the ball gets rolling is when the Advisory Committee starts it rolling based on suggestions, etc. If you're not at the table maybe you don't have quite as strong a voice as you would if you were part of the group making the decision to move the ball.

**Kirkpatrick:** Certainly, you can bring more people to the table but I think many people who are at the table view themselves as conduits of outside input. I assume that Ken, as a law professor, is picking up on some of the criticism. Greg is representing the practicing lawyers. So, I think the input comes through the people who are on the Committee already.

**Scallen:** Right. Let's move the microphone down because I am going to go to Greg next. I also know you want to get a word in here, Ken.

**Broun:** I just wanted to follow up. I would agree with what Laird has said. In the Committee, particularly before Laird arrived, there were heated discussions often between Justice Department people and people who had other points of view, including myself. We lost some of those fights. Steve Saltzburg never got through his *Bourjaily*<sup>27</sup> amendment. I never got through my anti-*Luce*<sup>28</sup> amendment. But, we did win some as well.

I think there was a lot of give and take and there was a lot of good intellectual discussion. There was a lot of feedback from other sources. So I felt that there has been good representation. I thought

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27. *Bourjaily v. United States*, 483 U.S. 171 (1987).

28. *Luce v. United States*, 469 U.S. 38 (1984).

some of the best discussions, and the best give and take, was on our abortive attempt to stop the 413-415 character evidence rules. Judge Winter even let me write the letter opposing that. He just took out the expletives.

**Joseph:** One thing that is ironic, let me just end that last point. Prior to Laird's appointment, Jim Robinson was on the Committee, opposing Department of Justice initiatives. Jim then became the Assistant in charge of the Criminal Division—and Laird's boss. There are some ironies involved. I'm sorry, I just wanted to mention that.

**Scallen:** No, no, I was just going to you anyway. So, let's talk a little bit more about whether there is a special quality to the Evidence Rules? I mean the Rules of Civil Procedure have been amended time and time again in the last few years. But nobody is talking about, at least as far as I know—we may hear otherwise during the comments from the audience—nobody is talking about disbanding the Civil Rules Committee, despite all the brouhaha over Rule 11, changing backwards and forwards—and then Rule 26—mandatory disclosure. The Evidence Rules were treated differently when they were adopted as Laird said. And they still seem to get treated differently. What's going on?

**Joseph:** I don't think it is a major insight to point out that the Evidence Rules have a much more immediate impact on winning or losing a lawsuit than the other rules. The Evidence Rules have much more direct impact. Just think about the obvious examples—subsequent repair evidence under Rule 407<sup>29</sup> for one. If that evidence came in, doesn't that substantially increase the likelihood of a plaintiff's verdict? And doesn't propensity evidence, if that were to come in, significantly increase the likelihood of a conviction?

Time after time you can come up with examples of how the Evidence Rules and the judgments that are reflected in the Evidence Rules have a very immediate impact. That's reflected in the Rules Enabling Act in two separate places. One section, which Ken is going to be talking about with privileges, is Section 2074(b), which specifically provides that any Rule creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by an act of Congress.

The general prohibition in Section 2072(b) against enlarging or abridging rights is taken very seriously, particularly because people have a stake in the outcome of trials. Billions of dollars change hands every year because of the outcomes. I'm only going to speak in terms of civil cases; I don't claim criminal expertise where personal liberty is also involved.

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29. FED. R. EVID. 407 (Subsequent Remedial Measures).

Just think about Rule 407. That rule was amended in 1997, because the 10th Circuit was the outlier circuit court saying that in products liability actions, subsequent repair evidence could be admitted. But that issue produced significant debate in the Advisory Committee. Even making that change for obvious purposes of uniformity affected rights. Changing the rule meant that plaintiffs in the 10th Circuit were less likely to prevail with that evidence not coming in. And the change passed in the Committee. There was overwhelming support, but there were dissenters arguing that Rule 407 should not be touched because it does have a substantive effect. Litigants—plaintiffs and defendants, institutions and individuals—have settled expectations that can be very significantly disrupted by major changes in the Federal Rules of Evidence.

Now having said that, let me tell you that, at the same time from a trial lawyer's perspective, it doesn't really matter what the rules are as long as I know what they are ninety-nine percent of the time. I'm sure you tell your students all the time there are basically three rules of evidence: Rules 402, 403 and 611.<sup>30</sup> Then there are things like the "Hillmon Doctrine."<sup>31</sup> There are only a few rules that really matter.

The expert testimony rules provide an interesting situation. I think it would have been irresponsible of the Advisory Committee to attempt to reverse the *Daubert* decision—putting aside that it would have been idiotic—because it never would have happened. But once the *Daubert* rule was articulated, it created settled expectations. The *Daubert* rule happened to be, at least in its genesis, more liberal than the *Frye* rule. The issue became gatekeeping. The one corollary to what Judge Smith said about federal judges is that they make mistakes—not all judges, not all the time, never Judge Smith, but other judges make mistakes.

**Judge Smith:** Thank you for clarifying that.

**Joseph:** You can write the rules any way you want and judges are still going to make mistakes. So, there are always going to be disagreements. I don't know any federal judge who, if he or she thinks a particular bit of evidence is important to a fair result, is going to exclude that evidence.

I remember when I was appointed to the Committee, Margaret Berger was the reporter. Margaret did a study and said she had reviewed 30,000 cases over the past X years and seventeen or twenty-

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30. FED. R. EVID. 402 (Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible); Fed. R. Evid. 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time); FED. R. EVID. 611 (Mode and Order of Interrogation and Presentation).

31. *Mut. Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892)(codified by FED. R. EVID. 803(3)).

seven had been reversed because of evidence reasons alone. Most all of those were criminal cases.

So judges have a lot of latitude. I enjoyed Professor Rice's article, which suggested that judges are constrained. The two examples he gave were the *Bock Laundry*<sup>32</sup> case, which was reversed by the Advisory Committee's amendment, and *Bourjaily*, as to which he said he could find no evidence that a change had been considered. Steve Saltzburg lost that case not only in the Supreme Court but also over three consecutive years in the Advisory Committee. Even those that agreed with him were tired of hearing about *Bourjaily* by the time we got through with Article VIII.<sup>33</sup>

**Scallen:** Greg, let me interject here. You have served as Chair of the Litigation Section of the American Bar Association. When you talk about what trial lawyers want, I listen. But when you say that what trial lawyers want is to know what the rule is, I am somewhat confused. The current Reporter for the Advisory Committee tells us there are twenty-one current evidence rules where the text or notes are flat out inconsistent with the case law in some circuits. Doesn't this mean I can't trust the text of the rule to tell me what the rule means?

**Joseph:** That's not correct. It does mean that, besides reading a thirty-five page pamphlet, you might see how it has been construed. People who get paid a lot of money to practice law are expected to do more than just look at the text of the rule.

**Scallen:** Let me follow up with that. One of my scholarly interests is the interpretation of the Evidence Rules—how those rules get construed. The Supreme Court has said time and time again that to construe the Federal Rules of Evidence we need only look to the "plain meaning" of those rules.

**Joseph:** I hear the same thing about contracts. I've never seen it stop a judge from looking at anything he or she wanted to in any event. But when you look at the plain meaning, every time you make a change to a rule, something in "the plain meaning" gets distorted.

I think of Rule 106<sup>34</sup> as a prime example of that. Nothing happened to it but that it was gender neutralized. Instead of saying that you may require him, the introducer, to introduce the other part, now it says "may require the introduction." So, now there is an issue of interpretation. Who gets to introduce the other part? Why do you want to change these things? Every change is going to be argued about because somebody will have an interpretation and a stake in the outcome.

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32. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989).

33. FED. R. EVID. art. VIII (Hearsay).

34. FED. R. EVID. 106 (Remainder of or Related Writings or Recorded Statements).

**Scallen:** I have a great solution for you. Let's go back . . .

**Joseph:** Let's let forty-five second-year law students at American University rewrite all the rules!

**Scallen:** No, no. It's easier than that—and cheaper. Let's just get rid of the code. That was an option when the rules you mentioned earlier were created. Recall when the desirability of codification of federal rules of evidence were being debated, when the Uniform Rules and the Model Rules were being debated by Professors Cleary and others—way back when. One of the options at that point was to have just the basic rules of relevance (now Rules 401 and 403). I suppose they would also have loved to give the judges the discretion they have under Rule 611. Let's just go back to that. Then you would never have to worry about the consequences of amendments or new rules. How about that?

**Joseph:** What problem, exactly, is eradicating the code going to solve? We have already ascertained that the problem is not that judges are too constricted. It's not one of putting people on notice of basic principles. I'd like to know exactly what the change is going to signify? Is it going to mean that we've changed the law of expert evidence? Have we changed the new amendment to Rules 703 and 701? What have we done to Rule 404<sup>35</sup> issues?

Everything you do in a rulemaking capacity has an effect. You can't do it frivolously.

**Scallen:** So, don't make rules that way. Don't have a code—go to a common law system of evidence.

**Joseph:** And what would that solve? Now that we've created complete upheaval and nobody knows what the law is, it would suggest that everything that has been developed under the Federal Rules of Evidence is wrong. We could have a common law criminal law system as well. We tried that until the late 1700s. There are some advantages to codes even though there will always be case law interpretations of codes.

**Scallen:** Well then let's talk about the advantages of codification. Because Ken Broun is looking at a project where he would codify law that is currently developed by the common law in the federal system. You all know that federal rules of privilege were rejected when the original "package" of federal rules was proposed in the mid-1970s. Professor Broun is going to look into codifying those rules of privilege once again. Well, talk about the political and other stakes—Ken, you have quite a project on your hands. So, tell us about it.

**Broun:** Yes. Thanks, Eileen. One of the things that I start out with in this project, and perhaps it may be a bit on the conservative

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35. FED. R. EVID. 404 (Character Evidence Not Admissible to Prove Conduct Exceptions; Other Crimes).

side for Paul but it is where I begin, is with some basic decisions that Congress has made that I'm assuming are not subject to change.

Congress has decided, first, that "it" is going to enact privilege rules, and will not allow the use of the Rules Enabling Act process. I assume that is not going to change. Second, Congress has decided that state privilege law would apply in those cases in which state law provides the rule of decision, primarily in diversity cases. It has also decided, however, that there is a federal law of privilege. That law, at least under its present scheme, should be developed under the common law process.

What I am proposing, and what I'm looking at through the Advisory Committee, is the possibility of codifying that federal law of privilege. Not changing the basic principle that the codification of privilege law has to be adopted by Congress, not changing the decision that in diversity cases, state privileges apply, but rather codifying the existing federal law of privilege.

What I propose is a codification of what I would call the "universally recognized" privilege law. Exactly where that recognition stops or ends, I think might be a bit of a problem, but I think that we can all agree on many of the privileges that would be included.

I also propose that, unlike the proposed federal privilege rules that were proposed in 1969 by Ed Cleary's Committee, these rules of privilege be open-ended. That is, the possibility would exist that a court could recognize a new privilege: A court could recognize a state privilege or could create a privilege theoretically that was unrecognized in the states based upon common law principles (much as the Supreme Court did in the *Jaffe*<sup>36</sup> case). There could be privileges that would not be codified that could in fact be recognized by a court. I think that kind of flexibility is necessary.

I am hesitant to use the example, but the concept of Rule 807<sup>37</sup> is a sound one—giving the courts the possibility of creating hearsay exceptions. I'm not sure that they have always exercised that in the way we would have liked, but that concept is a sound one and I think we would include that with regard to the federal privilege.

I also see, and I know Eileen is interested in this question, an ongoing process. I look at the process of developing these federal rules of privilege through the Advisory Committee process. That's how we started the project. The Advisory Committee is looking at the possibility of privilege codification. It sees proposed codified privileges going up through the Standing Committee, through the Judicial Conference to the Supreme Court and then to Congress.

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36. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

37. FED. R. EVID. 807 (Residual Exception).

Now, unlike a normal Rules Enabling Act situation, Congress would actually have to enact that codified privilege. I think that's not going to change.

I would also expect that once, in this long process, there were codified federal rules of privilege, that the amendment of those rules would occur in exactly the same way. They could be amended; there would be judicial interpretations of them. I can't imagine, just like the drafters of the original Federal Rules of Evidence, that we would get it absolutely right the first time. The courts are going to make changes. Congress will make changes. The Rules Advisory Committee will do it. But, I think that the process of the Rules Advisory Committee is open, is diverse, is something that can contribute greatly to the development of these rules. I see that process continuing.

**Joseph:** There is one issue that we ought to be aware of and that I have discussed with Ken. His paper is terrific, but there is a real issue about Evidence Rules and opening the door to privileges in Congress. Once you start with any privilege, you are going to have a series of people coming in to ask for one. In New York we have a social work privilege. You'll have a peer review constituency that will want to have that privilege. Individuals doing corporate internal investigations will want one. You'll be down to aromatherapists wanting a privilege. You never know what is going to get passed.

**Scallen:** There's a problem with an "aromatherapist privilege?"

I want to also raise as an issue, after having Professor Broun's draft: Ken, you've said here that in diversity cases state law privilege would apply. But, there is the issue of supplemental jurisdiction? What do you do when you have federal claims and state claims tried together? Your draft argues, right now, that federal privilege should apply. My question is, given the reality that any proposal on privilege law ultimately has to go to the Supreme Court, and given the "state's rights" bent of some of the justices on the current Court—putting that pesky *Bush v. Gore*<sup>38</sup> thing aside—can you sell the idea that federal law on privilege would control?

**Broun:** I'm not sure that I can sell anything, having been through the process. But, let me respond to your question first and then I want to say something about Greg's point.

The critical issue is the mixed state/federal case. Congress, when it was considering the privilege rules, was terribly concerned about what happens in a supplemental jurisdiction case. In fact, the courts have had relatively little problem with the issue. There have been a couple of cases that have said, well, this is a mixed case and state law

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38. *Bush v. Gore*, 531 U.S. 98 (2000).



applies. But of the couple of dozen cases that have been decided, virtually all have said federal law applies.

Usually it is in a situation in which the federal issues are clearly dominant. Usually it is in a situation which is pro-admissibility. Sometimes it is not. It strikes me that while the solution is not clear, picking up on Greg's point, it is better to have a rule than not have one. It seems to me that, in this instance, picking one of the two sets of law makes sense. If there is enough reason to have a federal law of privilege governing generally in federal cases, I think that there is enough reason to have that governing in these mixed cases.

I part company somewhat from my friend Dan Capra on this because Dan in his book<sup>39</sup> suggests that there ought to at least be a weighing process. My dissent from that is based upon the fact that a balancing approach creates uncertainty in the privilege area. You can't do it. It raises problems for the litigants that ought not to exist in a privilege context.

As to Greg's point in terms of the politics of privilege, it is well taken. You know you get politics in every privilege situation. I think there were a dozen amicus briefs filed in the *Jaffe* case. All from various psychology groups, social work groups and so on. So you get pressures on the court. My thought is that if the Rules Advisory Committee in its draft and in the proposals comes through with a set of rules that deal with the universally recognized privileges—and again there are some doubts to the boundary of those—if we do not go into the more exotic privileges, I think we will avoid most of the kinds of concerns that Greg is going to talk about.

You know there still are, even without a codification project, proposals in each session of Congress for various kinds of privilege. Part of my fear is that Congress will put in a parent-child privilege, or a corporate self-evaluation privilege, without thinking about how that privilege fits in the whole context of the law of privilege. That bothers me more than the possibility that if we propose privilege rules, there would be amendments sought once it got to Congress.

**Scallen:** What I want to do now, because I really do want to be one of those sections that actually lets the audience talk, is provide a chance for audience comments. Paul, do you want to come back? Do you want to contribute something? Or, do you want to wait for the audience questions?

**Rice:** Well, on the issue of privilege I have a particular interest because of my scholarship in the attorney-client privilege area. It is interesting if you are going to let judges change the rule. Are they going to be allowed to change the existing attorney-client rule to recognize an additional exception? The reason I ask that is because

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39. Capra, *supra* note 24.

California seems to be leading in law reform. They are usually ahead of the curve.

The federal system, under the common law privilege, is now ahead of California. In California, they have not legislatively enacted the fiduciary duty exception. The California court, in the case I cite in my footnote and can't read because of my eye, the California court said this was a good idea but they don't have the authority to recognize it.<sup>40</sup> So, the federal system has actually fared quite well by leaving this to the judges. Are you going to let the judges continue to have the authority to do that, and if you let them have that authority, then what purpose has codification served?

**Broun:** I think I would not leave it to the court to create additional exceptions. I think I'm talking about flexibility with regard to the recognition of new privileges. I would hope that we would draft the rule carefully enough that we would deal with the exceptions and with the actual application of the rule. I think it would be chaotic to deal with in any other way.

As to whether we could change federal law as it exists, we can propose anything. Whether it is likely to be accepted is quite another measure. And there is the issue of whether we think it's a valid idea, or whether the public, plus the Advisory Committee's analysis, suggests it is a valid amendment.

**Rice:** Do you think that the fiduciary duty exception would ever have been recognized had the privilege rules been adopted in 1974? They had been left in the code. I doubt seriously if we'd even have a fiduciary duty exception now with the restricted role that the Advisory Committee is taking in actually adding things like this to the rules.

**Broun:** I don't know. I don't know how things would have developed. It would depend on how the court cases went, what the scholarship said in the field—I think there's lots of reasons. I don't take the view that the Committee has ignored clear trends in law and scholarship. I think we have been very responsive to it.

**Scallen:** I want to interject just one point, Paul, because the one useful piece of scholarship that I do have is my California Evidence book which is thoroughly annotated. As Greg points out, you not only have to know the text of the rule, you have to look at the case law sometimes too. To me, the California Evidence Code is Exhibit A for why you do not want a legislative body making Evidence Rules.

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40. *Wells Fargo Bank v. Super. Ct.*, 990 P.2d 591, 591 (Cal. 2000) (California Supreme Court had no authority to create a "fiduciary" duty exception to attorney-client privilege for communications between trustee and trustee's attorney as privileges are created only by the California legislature). *See also* *Dickerson v. Super. Ct.*, 135 Cal. App. 3d 93, 99-100 (1st Dist. 1982) (citing *Garner v. Wolfenbarger*, 403 F.2d 1093 (5th Cir. 1970)).

There is a California Evidence Rule that talks about the admissibility of animal testing on products. Now that is the kind of micro-management and political input you get if you turn rulemaking over to the legislature entirely.

All right, let me take the mike out to the audience. There have to be questions. I have one in the back. I'm going to start back here and move my way up front. Please for the people back home, identify yourself for the tape.

### Audience Questions

**Kinvin Wroth:** Thanks. Kinvin Wroth of Vermont Law School. There is a constituency that has not been heard from, or about, much today. It certainly doesn't have much of a seat at that federal table that we've been talking about. That is, the rulemakers, trial judges and trial lawyers of those fifty other jurisdictions out there. Thirty-five to forty of which I'd guess (thirty-nine, thank you) have something like the Federal Rules.

Several of the panelists used the term "code" a few times to describe the Federal Rules. Once, way back there in the Ed Cleary days, there was sort of a sense that we were creating a code in the Napoleonic sense. Nevertheless, we see, particularly as Congress gets into the act, more specific codification, in the Internal Revenue Service sense, beginning to occur more and more with the Evidence Rules. Every time something like that occurs in probably half the states with something like the Federal Rules, a Rules Committee jerks—and in the other half of the states the jerks on the Rules Committee are asleep and nothing happens.

All of this is prelude to a question, I guess. Should the federal rulemakers, in addition to all of the other concerns that have been discussed this morning, continue to feel that there is some responsibility for thinking of the law of evidence—through this mechanism of codification—as a national body of doctrine and not simply the rules of practice in the federal courts?

**Scallen:** Excellent question. Panelists?

**Broun:** Let me try to respond to that. I think that there is no question that the Federal Rules are leadership rules. That the adoption by thirty-nine states indicates that there is a great deal of leadership that goes on by the adoption of the Federal Rules. I think that it is important that the Federal Rules take into account in our amendment and drafting the history of the existing rules, not only as they have been applied in the federal courts but how they have been changed and amended in the state courts as well.

But theoretically, the states have not adopted the Federal Rules. They have adopted the Uniform Rules which are based upon the

Federal Rules and the Uniform Commissioners have a seat on our committee, or have representation on the committee. They are involved. There was a state court justice who is always on our committee. So, I think, there is great attention paid to what is happening in the states and the impact that our rules may have on future state adoptions.

One of the arguments that I make for the privilege codification is that it would be useful to the states to have a better codification of privilege law than existed at the time of the proposed federal rules on privilege. In fact, the proposed federal privilege rules form the basis of the rules of a large number of states, something like thirty states. I hope that whatever federal rules on privilege are proposed, they would also have an impact on state law.

**Scallen:** Let me go over to this gentleman and then we'll go over to Myrna Raeder.

**Stephen Burbank:** Stephen Burbank from the University of Pennsylvania. I have two comments. One is that I am looking forward to reading Professor Broun's paper, because, not having taught evidence for a long time but knowing a little bit about the history of the Rules of Evidence, I am puzzled why it would be proposed to codify universally accepted privileges. If they are universally accepted, why do we need to codify them? I take it that some of the comments earlier suggest that some of the aspects of those privileges, such as exceptions to them, may not in fact be universally recognized.

Moreover, I hope that nobody is laboring under the misimpression, which has tended to be fostered by the Supreme Court of the United States, that Congress made a principled choice in favor of the common law method for federal privilege law. It did nothing of the sort. It avoided a hot potato. I cannot imagine why it would not want to avoid a hot potato in this instance as well.

It is true that timing played some small role in the decision, but it was basically that, as Greg's comments suggested, they had social workers after them, they had doctors after them. The same process would predictably occur if legislation of the sort that I gather Professor Broun has suggested were proposed. Congress again would do what it does best—punt.

The second point concerns supplemental jurisdiction and what law ought to apply with respect to state claims. I would suggest first of all that *Erie*<sup>41</sup> jurisprudence is totally irrelevant in answering that question. And second, that there is a federal interest—it would seem to me strong enough, combined with whatever interests might be implicated by the precise privilege in question—a federal interest not

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41. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

to have evidence admissible on one claim and not admissible on a closely related claim, which could predictably confound juries—if not judges.

**Scallen:** You know a little bit about the Rules Enabling Act, right Steve?<sup>42</sup> [audience laughter] Okay. Let me go over here to Myrna.

**Rice:** Can I add a comment? It arises with respect to Professor Broun's proposal. It seems as though with privileges, all types of them, the law and people who propose revisions never look at the policy underlying the privilege to determine which jurisdiction's law should apply.

It has always been curious to me that if the purpose of the attorney-client privilege is to get people to be candid at the front of the process, then how can they possibly know where an action is going to be filed? Whether it is going to be a state or a federal claim? Why isn't state law always controlling when it comes to attorney-client privilege? Then you would have the same decision whether it is a state or federal claim that is being asserted. I don't see anybody even considering that possibility.

**Burbank:** I think the question proceeds from, if not an erroneous premise, then one that is skewed—as much of the analysis in the area of privilege tends to be—by looking at the result of a law-making decision, rather than *ex ante* at the process of choosing among, or balancing among, competing policies. One such policy may be to foster a relationship like the attorney-client relationship. Another policy may be, to the extent that courts do this, actually to find the truth. Federal courts do have an interest in being able to do that.

I take it that if it were the case that a privilege was recognized in state law and not in federal law, it would be because the concern to have that evidence admissible was thought—as a matter of federal law—to outweigh the concern about the relationship. The concern to have that evidence admissible is a concern that is *very* much a federal concern, with respect to litigation in federal court of any sort. It is a particularly *strong* interest when the substantive law claim is a federal substantive law claim.

**Broun:** That's the point I was trying to make; I think that there is a federal interest. I would also add, in response to Paul's remark, that I do not view the utilitarian justification for the attorney-client privilege as the only justification for it. I think that there are other justifications based upon considerations of privacy and justifications based upon loyalty. There are other considerations that are involved

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42. Professor Burbank is the author of the leading scholarly piece on the Rules Enabling Act. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

that are equally significant and cut across state and federal lines pretty equally.

**Scallen:** Let me turn it over to Myrna.

**Myrna Raeder:** Hi. I'm Myrna Raeder, from Southwestern. I wanted to follow up on something that Ken just raised—the role of leadership concerning the states. At the beginning, the Federal Rules certainly were the main model that the states followed. Yet when the Uniform Rules of Evidence were revised in 1999,<sup>43</sup> the drafters made a conscious decision not to follow the Federal Rules, because there was a feeling that many of the congressional realities that we are hearing about today have lead to the Federal Rules taking a more conservative approach. You say, “if it's not broke don't fix it,” but we all will argue about how “broke” it has to be.

I would like the thoughts of the panelists on what now may be perceived as real differences in some of the Uniform Rules of Evidence that no longer pattern on the Federal Rules. And whether you think states will be adopting those changes? Also, if states did adopt the Uniform Rules changes, would that give the Advisory Committee a greater sense of freedom to make changes that you felt would not get you disbanded?

**Joseph:** I served as one of the ABA advisors to Uniform Rules back in the mid-1980s. We made some changes that were not adopted federally. I was never persuaded that the existence of the Uniform Rules, except in a few distinct states where the commissioners had real persuasive power, made all that much difference in terms of enactment.

I will be curious to see how many adopt the Uniform Rules version of the expert rules. Their attempt to deal with technological evidence was reviewed by the Federal Advisory Committee and was not followed. From my perspective, this was because their proposal was not only superfluous but also had a lot of internal problems—like creating so many different things that were all originals I didn't know what a secondary thing was any more. But it will be interesting to see whether the fact that the Uniform Rules Commissioners are asserting themselves will affect evidence law in the states significantly.

**Kirkpatrick:** I just wanted to add something to Myrna's comment. I think she is perceptive in noting that there is an increasing divergence between the Federal Rules and state practice. We talk about forty states having adopted the Federal Rules, but we know that a number of states never adopted *Daubert* so they are pretty unlikely to adopt the new Federal Rules 701 and 702. So there is that divergence.

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43. Uniform Rules of Evidence Act (Draft 1999), available at <http://www.law.upenn.edu/bll/ulc/ure/evid1200.htm>.

I think the states are struggling with the same issues that we are talking about here. Do they have a mechanism to review their rules once they are adopted? As a matter of history, I know many of you were here ten years ago, but it was really this Evidence Section that was the impetus to creating the Evidence Advisory Committee. That was a major project of this Evidence Section, as some of you who are in this room know—to press the Chief Justice to appoint that committee. So, I think all of us have a real interest in the Advisory Committee as a way of providing ongoing review to the Federal Rules of Evidence. But some states don't have a procedure like that. Some states have a way of automatically updating their rules, some have an ongoing committee, but some states adopted the Federal Rules or the Uniform Rules, as they were back in 1980, and have never looked at them since. I think this is a struggle each state faces in addition to the discussion we are having here.

**Scallen:** Professor McFarland has written about the "*Hillmon* Doctrine."<sup>44</sup> Did I understand you correctly, Greg, that maybe you don't think *Hillmon* is all that important? [Audience laughter]. I don't know if you are going to talk about *Hillmon*, Doug.

**Doug McFarland:** Thank you Eileen. I was not going to talk about *Hillmon*. [chuckling]. No, actually I wanted to make a comment about the politics of the Advisory Committee. Professor Rice, I think, suggests in his paper that the Chief Justice is kind of making the Committee conservative by the appointments to that Committee. It strikes me that some of Professor Rice's comments make the Committee sound like any other committee where they don't want to take on more work, rationalizing this decision with "if it ain't broke don't fix it" and "we are going to deal with things that interest us as individual committee members."

I did want to comment about the appointments to the Advisory Committee which, of course, is a very political thing. I worked for Chief Justice Burger for two years, and was present when he made a committee appointment one day. It was very much like any other situation where you go to appoint people to a conference or a committee. He and the Director of the Administrative Office sat there and I more or less listened. It was like, "well, who can we get for this?" "Oh, well, this is a good person." "Oh really?" "Oh, okay, how about this one?" It was a very much back and forth sort of thing. It wasn't like, "who can we get that is reliable?"

My guess, from what I know of Chief Justice Rehnquist, is that he is not going to be sitting there spending time batting names back and forth. But I think as a practical matter, it is the Director of the

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44. Douglas McFarland, *Dead Men Tell Tall Tales: Thirty Times Three Years of the Judicial Process After Hillmon*, 30 VILL. L. REV. (1985).

Administrative Office, or perhaps even the Director of the Federal Judicial Center who is suggesting names. Chief Justice Rehnquist is more or less saying, "okay." I don't think that he is making the Committee conservative.

**Judge Smith:** Can I respond to that? Thank you for your perspective, professor. First, as to how the selection is made for the Advisory Committee, it is in fact with a great deal of input from the Administrative Office. But, it starts—at least from the judicial representatives—with every federal judge basically getting a form every year that says, "would you like to be on a committee and if so, tell us what committee you'd like to be on." So, we volunteer for things that we are interested in.

The other thing is that one of the only criteria that I know the Chief Justice does have, and sticks to very firmly, is geographical diversity. He basically goes through and makes selections from the various circuits in turn. On the Evidence Committee, for example, there is never more than one judge from one circuit and all the circuits are rotated in representation.<sup>45</sup> That alone gives some diversity.

The other comment I'd like to make is that the final and most critical review for any rule change is the Judicial Conference itself. I tell you—I was the one who defended the proposed amendments to the Federal Rules of Evidence, and it was not an easy task. Some of you sitting here may wish I had lost.

**Scallen:** Do you mean the recent expert testimony rule amendments?

**Judge Smith:** Yes, the expert testimony changes and the Rule 103<sup>46</sup> change. But the Judicial Conference is made up of the Chief Judge from every circuit, plus an elected district judge representative from every circuit—elected by the circuit and district judges of that circuit.

So, the Judicial Conference is an incredibly diverse group. It spans a number of appointment years, a number of different philosophies, and as I say, the members of Judicial Conference are probably the most critical review board of all. I think that does

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45. Editorial note from Professor Scallen: Although a federal judge always serves as the Chair of the Federal Rules Advisory Committee, federal judges do not dominate the membership of the committees. Academics and lawyers make up the majority of some committees (such as the current Evidence Rules Advisory Committee) and are roughly equally represented on other committees. For example, the current Evidence Rules Advisory Committee includes four federal judges (including the current Chair of the Committee). There are five other members of the Committee (including the Reporter), none of whom are federal judges. The current membership of all federal rules committees are listed on the federal judiciary's website <http://www.uscourts.gov/rules/Memb02-02.pdf>.

46. FED. R. EVID. 103 (Rulings on Evidence).



suggest how extensive a role the Chief Justice personally does or doesn't have in all of this process.

**Scallen:** I do think that you suggest in your paper, Paul, that the Chief Justice has undue influence on this rulemaking process. Do you want to respond to what Judge Smith just said?

**Rice:** Well, I appreciate the realities of how it is a back and forth deal. But, the reality is that he makes the appointments. He has to take responsibility for who ultimately gets on the Committee. It is totally his. Nobody else has the power to say who will go on the Committee.

I think it should be diversified. I think it should be diversified by the geographical circuits and have someone from each one of them so that no one person has, or could possibly have, so much input on the development of legal principles.

**Scallen:** Would you get rid of the Department of Justice seat and the Federal Defender's seat on the Advisory Committee?

**Rice:** I don't mind people being there on the Committee if they don't have a vote. As long as there are sufficient public hearings and everybody's position has been made clear and published so that other entities can counter those positions—at least have some due process on paper—I think it is fine. As long as the process is transparent, the fact that you have a lawyer who is representing 8,000 people in the federal government doesn't bother me. I guess I'm not sure I care a whole lot about whether that person would be there or not. Because they will have the right to be at public hearings too.

**Chris Mueller:** Chris Mueller from Colorado. I too have noticed, as many of you have, that there is a greater resistance to changing evidence rules than there is to changing civil rules. I serve both on an Evidence Committee and a Civil Rules Committee in Colorado and we change the Civil Rules twice a year, and more often than that sometimes—very significant changes, too.

I have a slightly different explanation for why that is so than the suggestion that effects outcome directly. I think the Evidence Rules are more loosely textured than that the Civil Rules. Trial lawyers are far more comfortable in an environment in which they can do their song and dance and where the judge has some leeway in ruling on the issues. Trial lawyers would be much less comfortable in an environment that was much more extensively regulated. I think that really is the difference.

I also think that law students and practitioners carry forward a kind of mystical idea of the importance of evidence law. We succeed as teachers better than we imagine in our fondest dreams. People who, during our classes, are mystified by the hearsay doctrine become admirers of the hearsay doctrine as soon as they finish the evidence

course, and they have some confidence that they know what it means. They defend the doctrine and are troubled by any departures from it.

There is one other point I wanted to make which is related to some of the things that have been said here. I do think that sometimes the state rules have something to say to the feds that they ought to listen to. The Federal Advisory Committee has not been doing as good a job as it should in listening to those insights. The amendment to Rule 407 changed the law on product liability cases making subsequent measures inadmissible. A great many states have come out with exactly the opposite conclusion. I think the feds made a mistake there. I think it creates a great area of disparity.

Unlike Steve Burbank, I think the *Erie*<sup>47</sup> analysis does have a role to play both in the area of privilege and in the area of subsequent measures and in some other isolated areas. But my more general point is that I hope the Federal Rules Advisory Committee will pay a little bit more attention to state law than it does and not view that as capitulation to some notion of states' rights or some other common denigration.

**Scallen:** I know that the recent Rule 701 amendment was very much based on state practice. So, sometimes a change does reflect the way the states do it, but sometimes it doesn't. Rick Marcus.

**Rick Marcus:** Hi, I'm Rick Marcus. I teach at Hastings.<sup>48</sup> I want to say a word or two about the Civil Rules which, it has been asserted, are amended willy-nilly without controversy and easily. [Audience laughter].

**Joseph:** Much more commonly than the telephone book! [Audience laughter].

**Marcus:** Well, first off, that comment by Greg together with his earlier comment about how things always get screwed up if anything gets changed: I think that underscores a reality for all rules committees about being exceedingly cautious about unintended, unforeseen, and undesirable consequences.

Second, in regard to the Evidence Rules, since I was there with the Standing Committee when Judge Smith was, I think it is remarkable to assert that the Committee wouldn't undertake things that were controversial, given the controversy I saw there.

To revise things stem to stern because maybe they would have been better if done a certain way, way back when, is really a dubious undertaking. I call to your attention something called the re-styling projects, which many jurisdictions undertake as to various sets of rules, to improve their diction without allegedly changing their

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47. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

48. Richard Marcus was also a distinguished Advisor and Consultant on the Discovery Rules Project of the Advisory Committee on Civil Rules.

meanings. The Appellate Rules have already undergone that process. It's not clear to me which set of rules is next. That might be an event that calls for other kinds of stem to stern considerations.

**Rice:** We were accused of saying the Evidence Project was our model evidence code—it wasn't. We approached the issue from simply consistency—consistency within the rule and between the rules, consistency with the theory of our adjudicatory process, consistency with the Constitution.

The Project was really trying to get a public debate started about issues in the Code that people have had problems with since its enactment. Like this crazy assertive/non-assertive concept in Rule 801(a),<sup>49</sup> about the definition of hearsay. There are a lot of issues that simply need a public debate. We need more controversy about them and discussion about it, rather than simply the Advisory Committee saying, "well, we've reviewed the whole code once every so many years, and we found insufficient problems to make corrections." Their approach to looking at it is, the mantra that they use is—and literally every person I talk to that had been or was on the Advisory Committee independently used the phrase—"if it ain't broke, don't fix it." But the history of Advisory Committee seems to be, "it ain't broke if it ain't stopping traffic."

The point that you are making suggests the Advisory Committee really shouldn't do revisions of one article after another, not all at the same time. But we shouldn't try to make the code better over time. As long as we're functioning with the rule, just leave it alone. So we never get a better code if we take that attitude consistently.

All we were trying to do is get a debate started. I'd like to show them my model code. It certainly wouldn't look like the rules we have now. We were simply taking all of their assumptions, all of the rules in place and saying, "is there a better way we might just look at it—with your concepts in mind?" It wasn't stem to stern. We weren't trying to do that.

**Brown:** Can I just respond on a couple of levels? First, I'll admit that the Rules aren't drafted as artistically as they might be. But let me say a word about the original draft of the Federal Rules. We all have our quarrels with it, but that was a pretty damn good draft. Ed Cleary was a teacher of mine.<sup>50</sup> It was a pretty innovative draft, with interesting concepts and has withstood the test of time pretty well. Yes, there are things that are not great about it. There are things which in hindsight we might do differently. There are things that

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49. FED. R. EVID. 801(a) (Hearsay Definitions, defining a "statement").

50. Edward Cleary was the Reporter and primary drafter of the original set of Federal Rules of Evidence. Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1999).

have needed amendment and things that don't sound quite so great these days. But the essence of it is very solid. That is a good set of rules, and Ed Cleary did an outstanding job on it.

Secondly, it is not simply a question of "if it ain't broke, don't fix it." It is a question of when to remodel it. When you take this basically sound format of the rules and change it, you are risking the chances of misinterpretation. You're putting in new concepts. As Greg suggests, simply the change in gender has put in some differences in interpretation, things that were never intended. If we start from the beginning and we draft the Rules the way that Paul wants them drafted, we are going to run into a similar set of problems and we are back to the beginning.

**Rice:** Well, I guess I would say that you can't make an omelet without breaking eggs. There is going to be some potential for loss. Risks have to be taken if we want things to be better. I dare say at the time they originally drafted these rules in 1973, and adopted them in 1974, that the concept of "duplicates" in Article X<sup>51</sup> was highly controversial.<sup>52</sup> And, it has turned out to be life saving in the courts because nobody raises best evidence rule problems anymore. They are virtually gone. It turned out to be fabulously successful. They took a risk with it and it worked. We need people willing to take more risks on things that could be more efficient and save time for lawyers and avoid unnecessary litigation in court.

**Scallen:** I will use my prerogative as Chair to ask whether there are any last comments from all of you? Judge Smith?

**Smith:** I would just make a brief comment. Professor Rice just said you can't make things better without taking risks. But I seriously question, or want to ask, make things better for whom? You had made a comment earlier about "the plain meaning rule." I would submit that there is no such thing as plain English, having been a trial lawyer and now having sat on the bench. If you say "drive slowly" that's just two words, but what does "slowly" mean? What does "drive" mean? As Greg, I think, pointed out: Every time you change one word in a rule, it opens the whole thing up to new arguments.

At the Advisory Committee meetings, we would spend days sometimes talking about if we were to change three words, would people assume that meant A, or would they think it meant B, or would they think we didn't like what we had done before. It's a very

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51. FED. R. EVID. art. X (Contents of Writing, Recordings, and Photographs).

52. FED. R. EVID. 1002 (Requirement of Original), FED. R. EVID. 1003 (Admissibility of Duplicates), and FED. R. EVID. 1001(d) ("A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.")

difficult process. I understand, I think, what Professor Rice is saying and I respect it, but I think from the standpoint of the people in the courtroom that kind of undertaking would simply break far more eggs than we have room for omelets.

**Scallen:** Well, on that food metaphor, we'll break for lunch. [Audience laughter]. Thank you very much.